

**U.S. Department of Labor**

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**Issue Date: 20 March 2006**

Case No.: 2003-LHC-02591

OWCP No.: 05-78363

*In the Matter of:*

WILLIE L. MATTHEWS,  
*Claimant*

v.

NEWPORT NEWS SHIPBUILDING  
AND DRY DOCK COMPANY,  
*Employer*

Appearances:

Matthew H. Kraft, Esq., for Claimant

Benjamin M. Mason, Esq., for Employer

Before:

RICHARD E. HUDDLESTON  
Administrative Law Judge

**DECISION AND ORDER ON REMAND**

This proceeding involves a claim for permanent partial disability from an injury alleged to have been suffered by Claimant, Willie L. Matthews, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (hereinafter referred to as the "Act"). A Decision and Order (hereinafter referred to as the "D&O") was issued in the above action on August 6, 2004, granting Claimant temporary partial disability benefits from August 15, 1998, through December 31, 2001, at the compensation rate of \$21.06 per week. However, Claimant's request for permanent partial disability benefits from January 1, 2002, to the present and continuing was denied by this same D&O. Likewise, Claimant's request for a *de minimis* award was also denied.

On appeal, Claimant challenged the denial of the continuing permanent partial disability benefits and the denial of the *de minimis* award. On August 22, 2005, the Benefits Review

Board issued a decision and order vacating the D&O that had denied benefits and remanded the case for further consideration.<sup>1</sup>

The formal record was returned to this Office on December 15, 2005. Because this matter had been fully argued at the time of the initial decision, and because the parties have not requested to submit additional argument, the parties were not requested to submit briefs on remand. The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties made at the time of the initial decision and to the Board, applicable statutory provisions, regulations, and pertinent precedent.

## **ISSUES**

The issues to be decided on remand are whether Claimant has a loss of wage earning capacity for the period of January 1, 2002, to the present and continuing. If the Claimant does not establish a loss of wage earning capacity, it will be determined whether he is entitled to a *de minimis* award.

## **STIPULATIONS**

At the hearing, Claimant and Employer stipulated that:

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.
2. An employer-employee relationship existed at all relevant times.
3. The claimant sustained an injury to his back arising out of and in the course of his employment on November 20, 1990.
4. Written notice of the injury was not given within thirty (30) days but the employer had knowledge of the injury and has not been prejudiced by lack of such written notice.
5. A timely claim for compensation was filed by the employee.
6. The employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion.
7. The claimant's average weekly wage at the time of the injury was \$468.24, which results in a total compensation rate of \$312.16.

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<sup>1</sup> Because the Board held that there is sufficient evidence in the record from which to calculate Claimant's loss in wage-earning capacity, the Board declined to address Claimant's alternative contention that the denial of the *de minimis* award was in error. See generally, *Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd in part, cert. denied*, 250 F.3d 868, 35 BRBS 41 (CRT) (4th Cir. 2001).

8. The claimant was paid disability benefits in accordance with the prior Orders of October 31, 1994 and September 29, 1997, in this matter.
9. The claimant reached maximum medical improvement on August 15, 1998.
10. The parties agree to and incorporate the prior findings and stipulations included in the prior orders in this matter on October 31, 1994 and September 29, 1997.
11. The Claimant suffered a loss of wage earning capacity measured by a loss of overtime from August 15, 1998 through December 31, 2001 and would be entitled to permanent partial disability benefits at the rate of \$21.06 per week during that period.
12. The claimant, due to his back injury, is unable to return to his full duty, pre-injury work as a rigger.

### **DISCUSSION OF LAW AND FACTS**

Claimant worked for Employer as a rigger beginning in 1980. Claimant injured his back in the course of his employment in November 1990. Claimant sought treatment with Dr. Hardy, who performed surgery on Claimant in 1990 and in 1991. Claimant returned to work with restrictions that precluded him from performing his former duties as a rigger. Claimant's first assignment post-injury involved "staging equipment," and he also worked as a tool keeper, tracking the tools and issuing them to the riggers for their use. Claimant later was assigned to the hose shop where he fixed air lines and air hoses. Subsequently, Claimant attended "forklift school" and, after receiving his certification, began working as a forklift operator under the employ of Employer. Employer paid temporary total disability benefits prior to Claimant's return to work and temporary partial disability benefits thereafter.<sup>2</sup>

In 1999, Employer voluntarily converted Claimant's payments to permanent partial disability benefits. Employer filed a motion for modification on June 17, 2003, contending that

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<sup>2</sup> The parties agreed to an order issued by the District Director on October 31, 1994, which provided an award of temporary total disability benefits for the periods of November 21, 1990, to March 17, 1991; July 15, 1991, to October 6, 1991; and, October 12, 1991, to June 20, 1993, inclusive. The order also provided for "compromised" temporary total disability for various periods of time from June 21, 1993, to August 13, 1993, inclusive. (CX 3) As Claimant was able to return to modified duty, the parties agreed to another order for temporary partial disability benefits, which was issued by the District Director on September 29, 1997. This order provided for an additional period of temporary total disability benefits from November 1, 1995, to April 28, 1996, and for temporary partial disability benefits from August 14, 1993, to October 31, 1995; May 17, 1996, to July 15, 1996; and, July 21, 1996, to January 12, 1997. Additionally, the order directed Employer to continue paying temporary partial disability benefits at a rate of \$21.06 per week from January 13, 1996.

Claimant no longer has a loss in wage-earning capacity due to an inability to work overtime.<sup>3</sup> Thirty-three U.S.C. § 922. In that action, I granted Employer's motion for modification as I concluded that Claimant has no current loss in wage-earning capacity and denied benefits. I also found that any future loss in wage-earning capacity is too speculative, and thus denied Claimant a *de minimis* award. Claimant appealed these denials, and on August 22, 2005, the Benefits Review Board issued a decision and order vacating the Decision and Order denying benefits and remanded the case for further consideration.

To reiterate, Employer seeks modification of Claimant's permanent partial disability benefits.<sup>4</sup> Employer argues that Claimant no longer suffers a loss of wage-earning capacity because his injury has not prevented him from working overtime since January 1, 2002.

In order for Claimant to remain entitled to a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 110 (1991). Under § 8(c)(21) of the Act, if a claimant's injury does not fall under the "schedule" (§ 8(c)(1)-(20)), and it is determined that the claimant is entitled to compensation, "the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability." Thirty-three U.S.C. § 908(c)(21). As to the extent of Claimant's injury, the parties do not dispute that Claimant's injury is to his back. As Claimant's injury is non-scheduled, he must, therefore, prove that he has suffered a loss of wage-earning capacity. Thirty-three U.S.C. § 908(c)(21); *see also*, *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 919 (4th Cir. 1998) (quoting *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 282-83 (1980) ("Unless an injury results in a scheduled disability, the employee's compensation is dependent upon proving a loss of wage-earning capacity.")).

In determining whether Claimant continues to suffer a loss of wage earning capacity from his 1990 injury, his pre-injury average weekly wage must be determined. Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910(a)-(c), which are then divided by 52, pursuant to § 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS

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<sup>3</sup> The parties stipulated at the hearing that Claimant is entitled to permanent partial disability benefits of \$21.06 per week for the period between August 14, 1998, and December 31, 2001, based on a loss of overtime. There is no explanation in the records of the method the parties employed in reaching this figure. Nevertheless, Employer asserts that Claimant lost this entitlement as of January 1, 2002, arguing that Claimant no longer suffered a loss of wage earning capacity based on a loss of overtime. This is the basis of Employer's modification request that is the subject of the present matter.

<sup>4</sup> Permanent disability is a disability that has continued for a lengthy period of time. The date of permanency is established as of the date that the employee reaches maximum medical improvement. A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274-75 (1989). The parties have stipulated that Claimant reached maximum medical improvement on August 15, 1998. (JX 1). Therefore, Claimant is entitled to permanent disability benefits if it is found that he continues to have a loss of wage-earning capacity due to a loss of overtime.

340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10 of the Act (33 U.S.C. § 910) reads as follows:

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an average employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(a), (b), (c).

The statute sets a high threshold and, barring any unusual circumstances, requires the application of § 10(a) or (b). *Matulic v. Director, OWCP*, 32 BRBS 148(CRT) (9th Cir. 1998). Section 10(a) is the presumptively appropriate method for calculating average weekly wage and must be employed unless it would be unfair or unreasonable to do so. *Id.* Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. Thirty-three U.S.C. §910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. Thirty-three U.S.C. § 910(b). Only if neither of these two methods “can[ ] reasonably

and fairly be applied” to determine an employee's average annual earnings, then invoking § 10(c) is appropriate. *Empire United Stevedore v. Gatlin*, 25 BRBS 26(CRT) (5th Cir. 1991). Section 10(c) contains the general, catch-all provision applicable in cases where the methods in subsections (a) and (b) cannot be fairly and reasonably applied. Section 10(c) should only be used in cases when the actual earnings during the year preceding the injury do not reasonably and fairly represent the pre-injury wage earning capacity of the claimant and is often utilized in cases where the claimant's pre-injury work was either inconsistent or intermittent. *See Gilliam v. Addison Crane Co.*, 21 BRBS 91, 92-93 (1987).

In the present case, the parties stipulated that Claimant’s average weekly wage at the time of his 1990 injury was \$468.24, which results in a total compensation rate of \$312.16. In reaching this stipulation, it appears that the parties utilized the method found in § 10(a), and arrive at the agreed upon average weekly wage using Claimant’s actual daily wages. This is the proper method, as the record indicates that Claimant worked in the same employment for substantially the whole of the year immediately preceding the injury, and thus, his annual earnings are to be computed using his actual daily wage. As Claimant was an employee of Employer for more than one continuous year prior to his injury, § 10(a) is the appropriate standard in this case and his average weekly wage is computed using his actual daily wage.

Upon consideration of all of the evidence, I find that § 10(a) can reasonably and fairly be applied to determine the Claimant’s average annual earnings prior to the 2002 injury. Therefore, I accept the parties’ stipulation that Claimant’s average weekly wage at the time of this injury was \$468.24, resulting in a total compensation rate of \$312.16. Where overtime is a regular and continuous part of the Claimant’s wages, it should be included in computing his average weekly wage. *Bury v. Joseph Smith and Sons*, 13 BRBS 694, 698 (1981); *Brown v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 110, 112 (1989). Thus, since Claimant regularly worked overtime prior to his injury, I find that this average weekly wage figure includes the overtime wages earned by Claimant prior to his injury. Since Claimant’s injury to his back is an unscheduled injury, the compensation rate for Claimant’s permanent partial disability is governed by § 8(c)(21) of the Act. Section 8(c)(21) provides that the employee is entitled to 66-2/3% of the difference between his pre-injury average weekly wage and his post-injury wage earning capacity. Therefore it is necessary to determine the value of Claimant’s wage earning capacity before compensation can be fixed.

The post-injury wage earning capacity is governed by § 8(h) of the Act. Section 8(h) provides that the post-injury wage earning capacity of a partially disabled employee is equal to his actual earnings if they fairly and reasonably represent his wage earning capacity. If they do not, or if he has no actual earnings, the Administrative Law Judge may fix a reasonable wage earning capacity based on factors or circumstances such as the degree of physical impairment, his usual employment, and the possible natural future effect of the disability. *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984). Thus, a two-part analysis is generally required. *Devillier v. Nat’l Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). The first inquiry requires an Administrative Law Judge to determine whether the claimant’s actual post-injury wages reasonably and fairly represent his wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 794-95 (D.C. Cir. 1984). If the actual wages are unrepresentative of the claimant’s wage-earning capacity, the second inquiry requires that the Judge arrive at a dollar amount which does fairly and reasonably represent the claimant’s wage-earning capacity. *Id.* at 795. If the claimant’s actual wages are representative of his wage-earning capacity, the second

inquiry need not be made. *Devillier*, 10 BRBS at 660. The party that contends that the employee's actual earnings are not representative of his wage earning capacity has the burden of establishing an alternative reasonable wage earning capacity. *Burch v. Superior Oil Co.*, 15 BRBS 423, 427 (1983); *Misho v. Dillingham Marine & Manufacturing*, 17 BRBS 188, 190 (1985); *Spencer v. Baker Agricultural Co.*, 16 BRBS 205, 208 (1984).

Whether the employee's actual post-injury wages fairly and reasonably represents his wage earning capacity depends upon the consideration of several factors, including: the employee's physical condition, age, education, industrial history, and availability of work which he can do post-injury; the beneficence of a sympathetic employer; the employee's earning power on the open market; whether the employee must spend more time or use more effort or expertise to achieve pre-injury production; and, whether medical and other circumstances indicate a probable future loss due to the work-related injury. *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649, 651 (1979). If overtime is a regular part of a claimant's job, it must be taken into account in determining the loss of wage earning capacity. *Brown v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 110, 113 (1989); *Peele v. Newport News Shipbuilding and Dry Dock Company*, 20 BRBS 133, 137 (1987).

From the outset, I note that Claimant has presented no specific evidence or argument to establish that his current actual wages are not truly representative of his current wage-earning capacity. Instead, Claimant makes two arguments in support of his position that he is entitled to an award of permanent partial disability benefits for lost overtime during the period of January 1, 2002, to the present and continuing. Claimant first argues that his loss of wage-earning capacity can be properly measured by comparing the overtime available to and worked by him from January 1, 2002, to the present with the overtime worked by comparable co-workers during that period of time.<sup>5</sup> (Claimant's Brief, at 16). This argument necessarily assumes that Claimant's actual post-injury wages do not fairly and reasonably represent his wage earning capacity. In considering this matter on remand, I find that Claimant's actual post-injury wages do fairly and reasonably represent his post-injury wage earning capacity (discussed *infra*).

In my previous holding, I determined that it was impossible to calculate the amount of Claimant's potential loss of overtime because of the vast discrepancy of overtime of these three co-workers. However, the Board agreed with Claimant that the record contains sufficient evidence from which I could rationally determine a figure that represents Claimant's loss in overtime hours. (See CX 1, 8, 9; EX 6). The Board noted that § 8(h) of the Act does not provide a set formula for calculating loss in wage-earning capacity, but provides that the Administrative Law Judge should "fix such wage-earning capacity as shall be reasonable, having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and any other factors . . . which may affect [claimant's] capacity to earn wages in his disabled condition. . . ." Thirty-three U.S.C. § 908(h); see *Devillier v. National Steel & Shipbuilding Co.*,

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<sup>5</sup> For comparison purposes in the original D & O, I had previously credited only the records of those employees that were non-nuclear riggers, which was Claimant's pre-injury job. (D & O at 21; see generally, *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988)). I found that Charles Overton worked 501.6 hours of overtime in 2002, 533.1 hours in 2003, and had worked 93.8 hours of overtime by March 3, 2004. (CX 8 at 1). James Elam worked 378.3 hours of overtime in 2002, 180.5 hours in 2003, and had worked 18.5 hours of overtime by March 3, 2004. (CX 8 at 3). Mack Lassiter worked 378.5 hours of overtime in 2002, 514.1 hours in 2003, and 185.5 hours of overtime as of June 22, 2004.<sup>5</sup> (CX 8 at 5). This action was affirmed by the Board. (BRB Opinion at 15).

10 BRBS 649 (1979). The Board, thus, held that I had adequate, credible evidence from which I could have made a finding regarding the overtime Claimant lost as a result of his injury. However, the Board's finding also makes the assumption that Claimant's actual post-injury wages do not fairly and reasonably represent his wage earning capacity.

Nevertheless, I once again decline to use this evidence in determining Claimant's loss of wage earning capacity as it does not fairly represent Claimant's wage earning capacity. As stated above, § 8(c)(21) of the Act specifically mandates that the claimant is entitled to 66-2/3% of the difference between his pre-injury average weekly wage and his post-injury wage earning capacity. From the outset, I note that Claimant has failed to meet his burden of first establishing that his actual post-injury wages do not represent his wage earning capacity. See *De villier, supra*. Irrespective of this failure, I further note that the Board merely stated that this evidence was "adequate" to render a finding regarding the overtime Claimant lost as a result of his injury. However, the Board does not mandate that this particular calculation be used. I decline to use this method because this evidence is not probative as to whether similar overtime amounts would have been available to Claimant or whether Claimant would have even worked the overtime if it had been available. Notably, there is no evidence in the record of the amount of overtime these three co-workers worked in the years preceding Claimant's injury.<sup>6</sup> (CX 8). Thus, this evidence merely establishes that overtime remained available in Claimant's pre-injury job after his injury. However, this evidence is not probative, as mandated in *Brown*, on Claimant's loss of previously available overtime because of his injury. *Brown*, 23 BRBS at 113.

Claimant's second argument for entitlement to permanent partial disability benefits focuses upon a strict comparison of his pre-injury and post-injury wage records. (Claimant's Brief, at 22). In agreeing to follow this formula,<sup>7</sup> I find that Claimant's post-injury wages, including the overtime he has earned since January 1, 2002, are representative of his current wage earning capacity. There is nothing in the record to indicate that Claimant's current position is temporary, or that Claimant cannot perform the work. It appears that Claimant is performing a necessary function on behalf of Employer and that he fulfills all the requirements of the position. There is no evidence in the record that Claimant's compensation is different than that normally paid by Employer for this type of work. I find that this work is suitable for the Claimant, that he is physically able to do it, that it appears to be continuous and stable, and that in view of his

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<sup>6</sup> I note that there is testimony in the record that overtime is evenly distributed among the riggers. (TR. at 44, 50). However, this testimony is contradicted by the vast discrepancy among the amount of overtime worked by the three co-workers, and is, thus, not probative on the amount of Claimant's lost overtime.

<sup>7</sup> I had previously rejected this method because I found that Claimant is working virtually the same amount of overtime hours post-injury as he did in his pre-injury position. The Board vacated this rejection of Claimant's alternative contention because a comparison between his pre-injury overtime hours versus post-injury overtime hours reveals "very little difference." (BRB Opinion at 5.) The Board noted that although the difference between Claimant's actual pre-injury overtime hours and his post-injury overtime hours may be small, this is an invalid basis to find that Claimant had no loss in wage-earning capacity because the inquiry is whether Claimant sustained any loss in wage-earning capacity due to lost overtime, not whether there is more than a minimal difference between his pre-injury earnings and his post-injury wage-earning capacity. See *Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd in part*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001).<sup>7</sup> Thus, the case was remanded to determine a dollar figure that represents Claimant's loss in overtime due to his work-related injury. See *Everett*, 23 BRBS 316; *Jennings*, 23 BRBS 312; *Frye*, 21 BRBS 194; *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

seniority with Employer, there is no reason to question the stability of this position. In these circumstances, the Board has found that post-injury earnings are more likely to be found to fairly and reasonably represent Claimant's earning capacity. *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273, 276 (1990). In situations where, as here, Employer has given Claimant a non-sheltered position that is within Claimant's physical restrictions and which is continuous, Claimant's wage earning capacity on the "open market" is irrelevant. See *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282, 284 (1984), *aff'd* 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986). Based on all of the above, I find and conclude that the Claimant's current wages reasonably and fairly represent his wage earning capacity.

I also note that overtime should be included in the determination of Claimant's current wage-earning capacity. Nothing in the Act explicitly mandates a separate, special award of compensation based on lost overtime hours separate from that found in § 8(h). There is no question that where overtime is a regular and continuous part of the Claimant's wages, it should be included in computing his average weekly wage. *Bury*, 13 BRBS at 698; *Brown*, 23 BRBS at 112. Similarly, since there is no dispute that overtime is a regular and continuous part of Claimant's post-injury wages since 2002, it follows that it should be included as part of his wage-earning capacity. Thus, in the present case, and pursuant to § 8(h), Claimant's pre-injury average weekly wage, including overtime, must be compared with his post-injury wage earning capacity, as evidenced by his actual wages including overtime,<sup>8</sup> to determine whether Claimant suffers from any loss.

At the time of his injury in 1990, Claimant appears to have been earning \$10.98 an hour.<sup>9</sup> Claimant's corresponding overtime rate was \$16.47 an hour. The parties stipulated that Claimant's average weekly wage at the time of his injury was \$468.24. (JX 1). The record shows that from January 1, 2002, until December 31, 2002, Claimant worked a total of 2,144.1 regular hours and 122.4 overtime hours. (CX 1). When his wages are adjusted to his pre-injury regular hourly rate, thereby multiplying 2,144.1 regular hours worked in 2002 times the \$10.48

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<sup>8</sup> When post-injury wages are used to establish a claimant's wage-earning capacity and determine his permanent partial disability benefits, §§ 8(c)(21) and 8(h) of the Act require that the "claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at the time of claimant's injury." *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 127 (BRB 1996); *Richardson v. General Dynamics Corp.*, 19 BRBS 48, 49 (BRB 1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (BRB 1980). A disabled worker's post-injury earnings can only "fairly and reasonably represent his wage-earning capacity" if they "have been converted to their equivalent at the time of the injury." *Sproull v. Director, OWCP*, 86 F.3d 895, 899 (9th Cir. 1996). This conversion ensures that the calculation of the lost wage-earning capacity is not distorted by a general inflation or depression. *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297, 298 (BRB 1984).

It appears from the record that Claimant returned to his employment with Employer under the same wage rate that he had received prior to his injury. His wages have apparently increased over the years, likely as a result of general inflation. As a result, Claimant's current wages will be adjusted to his wage rate he had at the time of his injury to account for inflation to represent the wages that the post-injury job paid at the time of Claimant's injury.

<sup>9</sup> Claimant indicated that his overtime rate at the time of his injury was \$16.47. (Claimant's brief at 24). I assume that Claimant's overtime wage rate was time-and-a-half his regular rate, which means that Claimant's regular wage rate was \$10.98 per hour at the time of his injury.

(1990) regular wage rate yields a total of \$23,542.22 of regular wages. Likewise, by multiplying the overtime rate of \$16.47 by 122.4 hours yields \$2,015.93 of overtime compensation. Adding these two figures together equals gross wages for the period from January 1, 2002, to December 31, 2002, of \$25,558.15, when adjusted to Claimant's pre-injury (1990) wage rate. By dividing this figure by the 52 weeks worked during this period reveals that Claimant averaged a post-injury weekly wage of \$491.50. Subtracting this figure from Claimant's pre-injury average weekly wage of \$468.24 demonstrates that Claimant suffered no loss of wage earning capacity for the year 2002.

However, in 2003, Claimant worked a total of 2,004.5 hours and 100 overtime hours. Additionally, as of February 20, 2004,<sup>10</sup> Claimant had worked 289.0 regular hours, and 23 hours of overtime in 2004, or an average of 1.94 overtime hours per week. (CX 1). Thus, since the start of 2003 through February 20, 2004, Claimant worked a total of 2,293.5 regular hours. Multiplying Claimant's adjusted hourly rate (1990) of \$10.98 times the 2,193.5 regular hours yields total regular wages of \$25,182.65 for this period. Additionally, Claimant has worked a total of 123 overtime hours since the start of 2003 through February 20, 2004. Multiplying the overtime rate of \$16.47 times the 123 overtime hours equals total overtime wages of \$2,025.81. Adding Claimant's regular wages plus his overtime wages equals gross wages of \$27,208.46 during the period from January 1, 2003, to February 20, 2004. By dividing this amount by the 59 weeks worked during that period demonstrates that Claimant averaged a post-injury weekly wage of \$461.16 since the start of 2003. Subtracting this figure from Claimant's pre-injury average weekly wage of \$468.24 reveals a loss of \$7.08 per week, which correlates to a permanent partial compensation rate of \$4.72 per week for the period of January 1, 2003, through the present and continuing.

Therefore, pursuant to *Stallings*, I find that Claimant is entitled to permanent partial disability benefits in the amount of \$4.72 per week from January 1, 2003, through the present and continuing.

In light of this finding on remand, the issue of whether the Claimant should be given a *de minimis* award is moot.

## **ORDER**

Accordingly, it is hereby ordered that:

1. Employer, Newport News Shipbuilding and Dry Dock Company, is hereby ordered to pay to Claimant, Willie L. Matthews, permanent partial disability benefits from January 1, 2003, through the present and continuing at the compensation rate of \$4.72;
2. Employer is hereby ordered to pay all medical expenses related to Claimant's work-related injuries;
3. Employer shall receive credit for any compensation already paid;

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<sup>10</sup> This is the date of Claimant's wage records admitted into the record as CX 1.

4. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);
5. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application which represents only those periods of time while this matter has been pending before the Office of Administrative Law Judges, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

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RICHARD E. HUDDLESTON  
Administrative Law Judge